

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 6-3-2008

CORAM

THE HON'BLE MR.JUSTICE N.PAUL VASANTHAKUMAR

W.P.No.3455 and 4467 of 2004

W.P.M.P.Nos.5263, 41945 of 2004, 6546 of 2005

W.P.No.3455 of 2004

K. Anandhi ... Petitioner

Vs.

1. District Educational Officer,
Tirunelveli.

2. PLWA Higher Secondary School,
rep.by its Secretary,
Vikramasinghapuram,
Tirunelveli District.

3. P. Ganapathy ... Respondents

Prayer: This writ petition is filed under Article 226 of Constitution of India, praying this Court to issue a writ of mandamus directing the second respondent to fill up the vacancy of B.T. Assistant in History in PLWA Higher Secondary School, Vikramasinghapuram, Tirunelveli District.

W.P.No.4467 of 2004

P. Ganapathy ... Petitioner

Vs.

1. The Director of School Education,
College Road,
Chennai - 6.

2. The District Educational Officer,
Cheranmahadevi,
Tirunelveli - 1.

3. The Papanasam Labour Welfare Association,
Higher Secondary School
rep.by its Secretary,
Vikramasingapuram

4. M.Selvan

5. K.Anandi ... Respondents

Prayer: This writ petition is filed under Article 226 of Constitution of India, praying this Court to issue a writ of certiorarified mandamus calling for the records of the first respondent in Na.Ka.No.122032/G6/02, dated 12.2.2004 and quash the same and consequently direct the first and second respondents to approve the promotion of the petitioner to the post of B.T.Assistant (History) in the third respondent school with effect from 1.6.1997 and grant all consequential benefits.

For Petitioner in WP.3455/2004: Mr.R.Subramanian
& RR-4&5 in WP.4467/2004

For Petitioner in WP.4467/2004: Mr.Sundar Narayan
& 3rd Respondent in WP.3455/2004 for Mr.K.Kannan

For R-1 in WP.3455/2004 & : Mr.S.Gopinathan,
RR-1 & 2 in WP.4467/2004 Addl. Government Pleader

For R-2 in WP.3455/2004 & : Mr.S.Jayaraman
R-3 in WP.4467/2004

COMMON ORDER

Prayer in W.P.No.3455 of 2004 is to issue a writ of mandamus directing the second respondent School to fill up the vacancy of B.T. Assistant in History in PLWA Higher Secondary School, Vikramasingapuram, Tirunelveli District.

2. In W.P.No.4467 of 2004, petitioner seeks a writ of certiorarified mandamus calling for the records of the first respondent in Na.Ka.No.122032/G6/02, dated 12.2.2004 and quash the same and consequently direct the first and second respondents to approve the promotion of the petitioner to the post of B.T.Assistant (History) in the third respondent school with effect from 1.6.1997 and grant all consequential benefits.

3. The subject matter in both the writ petitions relates to promotion to the post of B.T.Assistant (History) in the Papanasam Labour Welfare Association Higher Secondary School, Vikramasingapuram. Hence both the writ petitions are disposed of by this common order.

4. For the purpose of convenience, the parties in this common order are referred to as arrayed in W.P.No.4467 of 2004.

5. The brief facts necessary for disposal of both the writ petitions as could be seen from the affidavit in support of the writ petition in W.P.No.4467 of 2004 are as follows:

(a) PLWA Higher Secondary School, Vikramasingapuram, is a recognised private aided school and it is governed under the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and the rules framed thereunder. Petitioner Ganapathy completed Secondary grade Teacher Training course in the year 1973, passed B.A degree in history in the year 1977 and B.Ed degree in the year 1981 from Madurai Kamaraj University. Petitioner also passed M.A. in Rural service in the year 1979 and M.A. History in the year 1999.

(b) Petitioner Ganapathy was appointed as Secondary Grade teacher in Hamim Middle School, Melapalayam. His appointment was approved and he was migrated from the said Hamim Middle School to the PLWA Higher Secondary School/third respondent School by the proceeding of the Chief Educational Officer, Tirunelveli, dated 16.10.1996 on condition that he should be placed as junior-most teacher in the seniority list. Petitioner joined in the third respondent School and his salary was not originally paid and after filing writ petition and contempt application, salary was released from 16.10.1996.

(c) According to the petitioner, one B.T Assistant (History) post became vacant in the third

respondent School from 1.6.1997 and petitioner applied for the said post seeking promotion based on his qualification. Four other teachers also applied for promotion. Interview was held on 24.5.1997 only to the petitioner as the other three candidates failed to attend the selection process. According to the petitioner, he was selected and appointed as B.T. Assistant (History) with effect from 1.6.1997.

(d) Since the petitioner's migration to the PLWA Higher Secondary School/third respondent School as Secondary grade teacher was not approved, the approval of promotion to the B.T. Assistant post was also not granted. The 4th and 5th respondents filed appeal before the first respondent on 31.7.1999 and the same having not been considered, they filed W.P.No.17696 of 1999 and prayed for issuing a writ of mandamus directing the third respondent School to promote them as B.T. Assistant (History). This Court by order dated 6.2.2002 directed the first respondent to dispose of the appeal filed by the respondents 4 and 5 dated 31.7.1999 within a period of two months.

(e) On 5.11.2002 third respondent reverted the petitioner from the post of B.T. Assistant (History) to the post of Secondary grade teacher on the ground that the first respondent by proceeding dated 21.10.2002 passed an order cancelling petitioner's promotion on the ground that he is junior to 4th and 5th respondents in the school. According to the petitioner he was not heard and therefore he filed W.P.No.42033 of 2002 before this Court and by order dated 29.4.2003 the order of reversion as well as the order of the first respondent dated 22.10.2002 were set aside on the ground of violations of principles of natural justice with further direction to the first respondent to issue prior notice to all parties and decide the issue afresh.

(f) The first respondent, after hearing petitioner as well as the contesting respondents passed an order on 12.2.2004 and allowed the appeal holding that the senior-most teacher alone is entitled to be promoted and directed the School Committee to meet and decide accordingly. The said order is challenged in W.P.No.4467 of 2004.

(g) The contention of the petitioner in W.P.No.4467 of 2004 is that the first respondent entertained the appeal on 31.7.1999 for the promotion given to the petitioner with effect from 1.6.1997 and the appeal is barred by limitation. Respondents 4 and 5 having not attended the written test as well as the interview, it is not open to them to file appeal and as per rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, promotion should be made on the grounds of merit and ability and seniority can be considered only when the merit and ability are approximately equal. The School Committee having found the merit and ability, direction to consider seniority is unsustainable.

6. Third respondent filed counter affidavit in both the cases stating that 4th and 5th respondents failed to attend interview on 24.5.1997 for promotion to the post of B.T. Assistant (History) and consequently petitioner was selected and appointed with effect from 1.6.1997. The migration of the petitioner itself was pending approval and after the order passed by the first respondent on 21.10.2002, petitioner was reverted back to the post of Secondary Grade Teacher and the original order passed by the Joint Director was set aside by this Court for non-compliance of the principles of natural justice. Again, the first respondent, after giving notice to the parties and conducting enquiry, passed the order holding that Ganapathy, petitioner in W.P.No.4467 of 2004, who was migrated from the other school, should be treated as Junior-most and in the absence of assessment of the merit and ability of the teachers, it should be treated as all the teachers are equal in merit and ability and the petitioner being junior-most, cannot be considered for promotion. The first respondent ordered that the senior-most person can be considered for promotion as B.T. Assistant (History). Therefore, third respondent management promoted the 4th respondent as B.T. Assistant (History) on 1.11.2002 and the same is yet to be approved. The third respondent further states that the petitioner's reversion and the order of the first respondent allowing the appeal filed by the 4th and 5th respondents were set aside by this Court due to want of notice to the petitioner and on remand the first respondent passed the impugned order. It is further stated that the first respondent recommended for promotion of the senior-most person for the post of graduate teacher and in these circumstances the promotion of the 4th respondent as graduate teacher was confirmed on 12.1.2004

and it was also resolved that the promotion of the 4th respondent dated 12.1.2004 can be sent for approval. It is further stated that for the misconduct committed for his misbehaviour with the girl students, disciplinary proceedings are pending against the petitioner. Therefore petitioner is not entitled to get promotion.

7. The case of the respondents 4 and 5 is that they are working as Secondary Grade Teachers in the PLWA Higher Secondary School, Vikramasingapuram, from 28.3.1997 and 1.7.1987 respectively, whereas the writ petitioner in W.P.No.4467 of 2004 viz., Ganapathy joined on 16.10.1996 in the said School by migration and as per the Government Instructions, a person migrated from another school will be the junior-most in the school. While promoting the said Ganapathy, the School Committee has not passed any resolution and the same was rightly set aside by the first respondent and the 3rd respondent is bound to promote the senior-most person as B.T.Assistant (History).

8. Heard the respective learned counsels appearing for the parties as well as the learned Additional Government Pleader.

9. The point in issue is whether the petitioner in W.P.No.4467 of 2004 was promoted by the School Committee in accordance with the rules from 1.6.1997 and the said order having been set aside, whether the first respondent was justified in cancelling the promotion given to the petitioner from 1.6.1997 and whether the promotion given to the 4th respondent can be treated as valid.

10. The file relating to promotion to the B.T.Assistant post in the PLWA Higher Secondary School, Vikramasingapuram, maintained by the second respondent was produced by the learned Additional Government Pleader. From the file it is found that the petitioner Ganapathy was given promotion from 1.6.1997 as B.T.Assistant (History) by the Secretary of the School without any resolution passed by the School Committee and only on 20.5.1999 the School Committee by resolution No.9 has chosen to ratify the promotion given to the said Ganapathy. Thus, it is beyond doubt that the competent authority viz., the School Committee has not considered the merit and ability as required to be considered under Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, while granting promotion to the said Ganapathy. The merit and ability of the petitioner having not been assessed and promotion having been given only by the Secretary of the School, who shall act on the basis of the resolution passed, the promotion order given to Ganapathy from 1.6.1997 cannot be treated as valid promotion order. The said promotion order was set aside by the first respondent, even though on different ground, the same cannot be set aside and if the same is set aside it would pave way for restoring the illegal order.

11. The promotion given to the 4th respondent is also without considering the merit and ability of the 4th respondent by not following Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974. The same is evident from the School Committee resolution dated 14.2.2004 and in resolution No.2 it is stated that from 1.11.2002 the School Committee granted promotion to M.Selvan on the basis of seniority in the cadre of Secondary Grade Teacher and therefore proposal is submitted to the District Educational Officer for approval. The said resolution clearly establishes a fact that Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, was not followed even while giving promotion to the said M.Selvan by the School Committee on 1.11.2002.

12. (a) Similar issue as to whether the merit and ability should be considered before giving promotion to the higher cadre in the private schools from the lower cadre, came up for consideration before the Supreme Court in the decision reported in 2008 (1) LW 763 = (2007) 6 SCC 382 (S. Sethuraman v. R.Venkataraman). In paragraphs 16 and 17 it is held as follows:

"16. The terms and conditions of service of the teachers of an aided school are governed by the Act and the rules framed thereunder. The Managing Committee of the school in terms of Rule 15 of the Rules are enjoined with a duty to fill up the post of Headmaster primarily on the basis of [merit and ability]. Indisputably, the Committee while appointing a person must take into consideration the merit and ability of the candidate alone and only when the respective merit and ability of two candidates are equal, seniority will have some role to play. Respondent 1 is senior to the appellant only by 13 days. At the relevant point of time, the appellant had passed the prescribed Accounts test

for Headmasters conducted by the Tamil Nadu Public Service Commission in the year 1989. Before us various other factors have been placed for the purpose of showing that apart from the fact that the appellant was more qualified, Respondent 1 having regard to his past services should not have been considered suitable for appointment to the said post.

17. While exercising the appellate jurisdiction, the appellate authority has indisputably a plenary power. It may not only consider the respective educational qualifications and other activities of the respective candidates for the purpose of arriving at a decision as to which of the two candidates had better merit and ability, but it should exercise its jurisdiction keeping in view the views of the Managing Committee. If two views are possible, ordinarily, the view of the Managing Committee should be allowed to prevail."

After noticing the said factual aspect, the Supreme Court remitted the matter back to the Joint Director of School Education for consideration of the matter afresh taking note of the merits and demerits of the contesting parties.

(b) While giving promotion, merit and ability are bound to be considered by the School Committee in accordance with Rule 15(4) of the Rules, as per the Division Bench judgment of this Court reported in 1994 (1) MLJ 130 (D.Jeyaselvi v. The Government of Tamil Nadu). The writ appeal before the Division Bench arose against the order of the learned single Judge cancelling the selection on the ground that merit and ability of each of the candidates were not assessed and recorded by the School Committee. The contention of the appellant therein was that the School Committee having found the appellant as superior in merit and ability than the other candidate, the learned single Judge ought not to have set aside the promotion and remit the matter for fresh consideration to record reasons. Negating the said contention in paragraph 4 the Division Bench held as follows: "4. In this regard, it may be pointed out that Sub-rule (4) of Rule 15 of the Tamil Nadu Recognised Private Schools (Regulation) Rules (1974) specifically states that promotions shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal. Therefore, in order to satisfy or to act in accordance with sub-rule (4) of Rule 15 of the Rules, the committee must place on its records or the proceedings of the committee must disclose that the selected candidate is more meritorious and is also superior in his ability than the one who is not selected. If we have to accept the contention of the learned counsel for the appellant, then, we will be giving an unbridled power to the Selection Committee, which can arbitrarily say, of the two candidates appearing before it, one is more meritorious and another is less meritorious without any basis whatsoever. Such arbitrary exercise of power cannot be permitted or upheld as Art.14 of Constitution strikes at such arbitrary exercise of power. Therefore, it is necessary for the Selection Committee to record the grounds of merit and ability on the basis of which it has made the selection. This interpretation of ours also accords with the very scheme of the Act and the Rules. It may be pointed out here that every decision of the Selection Committee is made appealable to the Appellate Authority. If the Selection Committee is not required to state the grounds on which the selection is made, it is not possible to hold on what basis, the Appellate Authority should consider the validity of the order passed by the Selection Committee, unless it be that Selection Committee gives the grounds for coming to the conclusion that the selected candidate is more meritorious and is superior in his ability than the one who is not selected. We have already re-produced the relevant portion of the Supreme Court's decision relied upon by the learned counsel for the appellant in *National Institute of Mental Health & Neuro Sciences v. Dr.K.Kalyanaraman*, AIR 1992 SC 1806: 1992 Lab.I.C. 1800: (1992) 2 SCC 461. That decision proceeds on the basis that if there are no Rules, it is not necessary for the Selection Committee to pass a considered order and when the Rule provides that it must make the selection on the ground of merit and ability, the Selection Committee is required to state what are those grounds on which a candidate is selected in preference to the one who is not selected. It is also relevant to notice that the Supreme Court in the aforesaid case was dealing with the case in which the decision of a Selection Committee was not made appealable. Therefore, we are of the view that the ultimate decision arrived at by the learned single Judge is just and proper and as such, it does not call for interference. Consequently, it follows that this writ

appeal must fail. It is accordingly dismissed."

(c) A learned single Judge of this Court in the decision reported in 1991 WLR 694 (P.Rajendran v. The Government of Tamil Nadu) in paragraph 9 held as follows:

"9. it is seen that under R.15(4) the appointment to the post of Headmaster is by process of selection, merit and ability is the criteria and seniority will count only where merit and ability are approximately equal. Therefore, the Management is not bound to appoint a person merely because, he is senior in service. They can take note of the merit and ability of the respective candidates, who aspire for the post of Headmaster."

13. It is to be noted that for promotion to any teaching post in private schools, Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, is bound to be followed. The School Committee while promoting the petitioner on 1.6.1997 has not considered the merit and ability and the assessment of merit and ability said to have been made according to the petitioner Ganapathy is only by the Secretary of the School, who has no independent power to give promotion as per Rule 13(4) of the Rules. The said rule clearly states that the secretary of the School Committee shall act on the basis of the resolution passed at the meeting of the School Committee. The power of appointment is also one of the functions of the School Committee as per Section 18(1)(b) of the Act. Hence the order of promotion given to the petitioner from 1.6.1997 cannot be treated as valid promotion order. Similarly, 4th respondent was given promotion as B.T. Assistant (History) only on the basis of Seniority in terms of the order of the first respondent. The merit and ability having not been considered as per Rule 15(4), the promotion given to him also cannot be treated as valid promotion as the same was made contrary to the statutory rule.

14. On the basis of my above findings, W.P.No.4467 of 2004 is dismissed. W.P.No.3455 of 2004 is allowed with a direction to the PLWA Higher Secondary School to fill up the B.T. Assistant (History) post strictly in accordance with Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, considering the merit and ability of all the candidates and if it is found that the merit and ability of two candidate are found approximately equal, then seniority has to be considered for selecting a person as B.T. Assistant (History) under the said rule. The third respondent is directed to comply with this order within six weeks from the date of receipt of copy of this order. No costs. Connected miscellaneous petitions are closed.

Index : Yes/No.

Website : Yes/No. 6-3-2008

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To

1. The Director of School Education,
College Road, Chennai - 6.

2. The District Educational Officer,
Cheranmahadevi, Tirunelveli - 1.

Note to Registry:

Issue copy on 11-3-2008

N.PAUL VASANTHAKUMAR, J.

Vr

Pre-Delivery Order in
W.P.Nos.3455 & 4467/2004

6-3-2008